



Arizona Department of Administration, Procurement Compliance, Administration & Policy Office Publication

This publication is not intended or represented to be the official record of laws and regulations covered under statutes, A.R.S. 41-2501 et. seq., and administrative rules and regulations A.A.C. R2-7-101 et. seq., that constitute the Arizona Procurement Code ("Code"). In the event of a discrepancy between this publication and applicable statute and rule, statute and rule shall prevail.

PCAP Technical Bulletin No. 019 Revision No. N/A Conducting RFP Discussions

I. Statement:

This technical bulletin is issued to provide guidance to procurement officers on government procurement best practices for conducting Request for Proposal discussions.

II. Authority:

- R2-7-202 Delegation of Procurement Authority to State Governmental Units
- A.R.S. §41-2534 Competitive Sealed Proposals
- R2-7-C301 Competitive Sealed Proposals

III. Alternate document/publication resources:

- Arizona Procurement Code available at www.pcap.azdoa.gov and www.azeps.az.gov
- Agency procurement delegation acknowledgement document (on file at the agency and PCAP)

IV. Definitions:

- **Best Value Procurement:** The expected outcome of an acquisition that, in the State's estimation, provides the greatest overall benefit in response to the requirement. Best value, using competitive negotiated (RFP) procurements, describes the outcome that should be achieved by that process.
- **Clarification:** Written or oral communication with an offeror, including demonstrations, interviews or questions and answers, for the sole purpose of information gathering, eliminating minor informalities or correcting nonjudgmental mistakes in a proposal. **Clarification does not otherwise afford the offeror the opportunity to alter or change its initial proposal (offer).**
- **Deficiency:** A material failure of a proposal to meet a solicitation requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level. If discussions are conducted, deficiencies shall be identified for offerors who are in the competitive range.

- **Discussions:** Oral or written negotiations between the State and an offeror during which information is exchanged about specifications, statement of work, terms and conditions and price (cost) set forth in the proposal. Communication with an offeror for the sole purpose of clarifications does not constitute "discussions" or "negotiations". Discussions provide the offeror with the opportunity to alter or change its proposal.
- **EPS:** "Enterprise Procurement Services" means state procurement office as defined in R2-7-101 (50)
- **Final Proposal Revision (FPR):** Offer revision submitted to the State, after discussions with offerors in the competitive range. If discussions are conducted, all offerors in the competitive range shall be given the opportunity for discussions and invited to submit an FPR. The FPR is also commonly referred to as a best and final offer or BAFO.
- **Negotiation:** The act of bargaining with another to achieve an agreement. Communications or conferences conducted to reach a settlement or agreement. In government contracting, negotiation is bargaining with offerors after receipt of proposals and before requesting final proposal revisions.
- **Procurement Officer:** Any person duly authorized to enter into and administer contracts and make written determinations with respect to the contracts. Includes an authorized representative acting within the limits of the authorized representative's authority.
- **SPIRIT** - The State's e-procurement system and website located at www.azeps.az.gov.
- **Strength:** A characteristic in an offer that exceeds the minimum standards of the solicitation or is comparatively superior to other offers.
- **Weakness:** A flaw in a proposal that increases the risk of unsuccessful contract performance or a characteristic of a proposal that is comparatively inferior to other offers. A "significant weakness" in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance. If discussions are conducted, significant weaknesses shall be discussed with offerors who are in the competitive range.

V. Overview:

By A.R.S. §41-2534 Competitive Sealed Proposals, paragraph (F), "As provided in the request for proposals, and under rules adopted by the director, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible to being selected for award for the purpose of clarification to assure full understanding of the solicitation requirements and to permit revision of offers. Offerors shall be accorded fair treatment with respect to any opportunity for discussion. Revisions may be permitted after submission and before award. If discussions are conducted, all offerors who have submitted proposals that are determined by the procurement officer to be in the competitive range shall be invited to submit a final proposal revision. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors".

VI. Discussion:

Discussions may be conducted with responsible offerors to clarify proposals and government requirements to assure mutual understanding and to permit revision of offers. The procurement officer may award contracts based on the proposals received without discussions. The procurement officer may also elect to conduct negotiations and request final proposal revisions before awarding contracts. If negotiations are conducted, they shall be performed fairly and equitably.

VII. Written or Oral Discussions:

Once the decision has been made that award cannot be made on the basis of the initial proposals, the agency must conduct "written or oral discussions" with all competitors determined to be within the competitive range. The term "written or oral discussions" is derived from the statutes and has become a term of art in government contracting. Discussions are a special type of negotiation between a government and competing offerors, conducted in a competitive environment.

Arizona Revised Statutes §41-2534(F) require written or oral discussion with all responsible offerors who are in the competition range, but provide no guidance on the purpose of the discussion process, the procedures to be followed, or the matter to be discussed. Generally the contracting (procurement) officer shall conduct written or oral discussions with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition and proposal.

During discussions, the contracting officer shall:

- Lead and Control all discussions;
- Advise the offeror of deficiencies and significant weaknesses in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;
- Attempt to resolve any uncertainties concerning the technical proposal;
- Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible; and
- Provide the offeror a reasonable opportunity to submit any cost or price, technical or other revisions to its proposal that may result from the discussions.

Discussions are conducted in a competitive environment. The contracting officer negotiates separately with multiple offerors and must be careful to avoid disclosing information contained in a proposal to a competing offeror.

VIII. Purpose of Discussions:

Several purposes are served by the discussion process:.

1) Maximizing Effective Competition

One of the major purposes of conducting discussions is to maximize effective competition. Federal legislative history reveals a congressional intent that negotiations be conducted under competitive procedures to the extent

practicable so that competition is maximized and the government is assured of receiving the most favorable contract.

To ensure maximum effective competition, discussions should be conducted with the aim of obtaining a sufficient number of acceptable proposals to ensure sustained competition until source selection. Since one of the primary purposes of conducting discussions with offerors is to raise to an acceptable status those proposals which are capable of being made acceptable, and thereby increase competition for contracting, it is incumbent upon government negotiators to be as specific as practical considerations will permit in advising offerors of the corrections required in their proposals.

The primary method of maximizing competition through discussions is to disclose all the deficiencies and significant weaknesses in each proposal within the competitive range. Thus, the primary duty of the contracting officer is to disclose deficiencies and significant weaknesses to an offeror whose proposal can be improved to the extent that it could win the competition. When all but a single offeror are eliminated from the competitive range, the issue of whether other offerors could be made competitive through the discussion process is very carefully scrutinized. The Comptroller General (Comp Gen) has granted protests because an analysis of the deficiencies indicated that they dealt with issues that could be readily corrected, through permitting sustained competition until source selection.

2) Producing Acceptable Final Proposal Revisions (Best and Final Offers)

In general, discussions should be conducted in order to come to agreement on such matters as cost or price considerations, incentive arrangements, scope of work (technical) matters, special provisions to be incorporated in the contract or scheduling. Negotiations are also frequently required to resolve any errors, omissions or deficiencies that were identified during the initial evaluation prior to establishment of the competitive range.

3) Fairness to Offerors

Treating all offerors fairly is a major concern when conducting written or oral discussions. There should be no discrimination against or preferential treatment given to any competitor. Any discussion with competing offerors raises the question as to how to avoid unfairness and unequal treatment.

Decisions and court opinions have addressed a number of aspects of fairness in the discussion process. First and foremost, fairness requires equal treatment of offerors with similar deficiencies. However, it does not require the government to spend an equal amount of time with all offerors, or to discuss the same areas with each offeror. The content and extent of discussions with each offeror will be determined by the deficiencies in the particular proposal. An agency may properly conduct extensive discussions with offerors whose initial proposals contain technical deficiencies while conducting more limited discussions with offerors whose proposals contain fewer weaknesses. Thus, it is proper to conduct detailed discussions with offerors whose proposals contain technical deficiencies while affording those with technically acceptable proposals only an opportunity to submit a FPR. The government may also reveal the cost estimate to an offeror proposing a cost considered too high without disclosing the estimate to an offeror submitting an acceptable proposed cost.

Fairness also requires the government to ensure that offerors compete on an equal basis. When it becomes apparent that offerors are proposing on a different basis because the specifications are ambiguous, the government has a duty to conduct further discussions to assure competition on the same basis. Unfairness was found in cases when the proposals indicated that the offerors did not understand the quantity of work required and when an agency provided clarifications to one offeror, but did not provide the same clarifications to the protester. Competition on an unequal basis was found where the government inaccurately informed all offerors how much higher their proposed costs were than the government estimate and the information given to the protester involved a significantly larger percentage error than the mistaken figures provided to other offerors. Unfairness was evident when one offeror was not provided the same specification information during discussions (the government told only one offeror that it had decided to delete a significant portion of the work).

Finally, although one of the government's aims is to obtain a sufficient number of technically acceptable proposals, the government must not unfairly assist one offeror during discussions to the detriment of other offerors. For example: an agency improperly suggested that one offeror use a more powerful computer that had recently come on the market without providing the same suggestion to other offerors. Also, it was found improper to inform only one competitor that the government would accept performance that seemed to be out of compliance with the specifications. Such unequal treatment can also occur through "technical transfusion" or through "technical leveling".

IX. Prohibited and Discouraged Practices:

1) Technical Transfusion

Contracting officers are prohibited from disclosing technical information from proposals of other competitors in the course of discussions. This practice is often described as "Technical transfusion". The Comp Gen stated: "Any discussion with competing offerors raises the question as to how to avoid unfairness and unequal treatment. Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair. We agree that such "transfusion" should be avoided." The Comptroller gave a further reason for avoidance of this practice, stating that if the Government disclosed technical innovations to other offerors, offerors would tend to hold back technical innovation from the negotiation process.

The Comp Gen has held that discussions should have been conducted to inform the protestor of omissions in its proposal and that this could have been done without revealing the technical approaches of other offerors. Where the RFP involves medium to high technology, limited discussions are often called for as a means of precluding technical transfusion.

2) Technical Leveling

Technical leveling is the practice of helping an offeror raise a proposal to the level of its competitors through successive rounds of discussions. At one time, Federal procurement laws prohibited the practice of technical leveling. However, this prohibition was eased in recent Federal procurement reform efforts. Government generally desires to base its source selection decision on the competence and inventiveness of the offeror. Technical leveling is discouraged when it is used to assist an offeror who lacks diligence, competence or inventiveness in

preparing its proposal. The essence of technical leveling is improper coaching which permits an offeror with inferior capabilities or technical approach to prepare a superior proposal. Coaching can result in award of the contract to an incompetent contractor and is unfair to more qualified competitors.

3) Auctioning

Contracting officers are required to conduct discussions concerning perceived problems with the offeror's cost proposal but are precluded from using auction techniques. The following examples of auction techniques are prohibited:

- Indicating to an offeror a cost or price that it must meet to obtain further consideration;
- Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the government to be too high or unrealistic); and
- Otherwise furnishing information about other offeror's prices.

A Violation following the guidance of the first illustration will not be found unless the contracting officer is very specific in stating that a price must be met. Thus, it has been found that this rule was not violated where the contracting officer merely suggests a lower price. For example, the contracting officer reopened negotiations after both best and final offers contained prices considered too high and told the protester the Army was "looking at a \$1,740 unit price. The Comptroller indicated that this procedure was proper because the point of the auction prohibition was to prevent direct price auctioning between offerors, not to prevent disclosure of the Government's price goal.

4) Disclosure of Deficiencies (Issues)

The purpose of discussions is to disclose proposal deficiencies and significant weaknesses to offerors in such a way as to permit correction. This results in better proposals from the government and maximizes competition. The essence of meaningful discussions is to point out the offeror's deficiencies and significant weakness and to permit it to revise its proposal to correct those deficiencies. The contracting officer is required to advise an offeror of deficiencies and significant weaknesses in its proposal so that the offeror is given an opportunity to satisfy the government's requirements.

In evaluating whether there has been sufficient disclosure of deficiencies, the focus is not on whether the agency described the deficiencies in such detail that there could be no doubt as to their identification and nature. Instead sufficient disclosure occurs when the agency imparted sufficient information to the offeror to afford it fair and reasonable opportunity in the context of the procurement to identify and correct the deficiencies. The requirement for meaningful discussions varies with the context of the procurement. Where certain information is specifically requested in the solicitation, the government is not necessarily required to remind an offeror to submit the information with its final proposal revision.

Deficiencies in meeting the requirements of the RFP must be disclosed by the government. Deficiencies or significant weaknesses can include such matters as failure to meet specifications, failure to submit information or

questionable technical or management approaches. Such matters may raise doubts concerning the possibility of accurate evaluation of the proposal or may indicate that it is or may be unacceptable. The obligation to disclose deficiencies will be enforced most strictly when it is found that the contracting officer has disclosed deficiencies or significant weaknesses to one offeror but has failed to disclose them to another offeror. The government is not obligated to point out problems with a proposal containing no deficiencies or significant weaknesses.

5) Deficiencies vs. Weaknesses

It is not necessary to discuss a weakness merely because a proposal is inferior in comparison with other proposals. For the purpose of conducting discussions with offerors determined to be within the competitive range, a deficiency is defined as any part of an offeror's proposal which would not satisfy the government's minimum requirements established in the solicitation. Deficiencies identified shall derive only from individual evaluation of each offeror's proposal against the specific evaluation standard or the government's minimum requirements established in the solicitation. In no event are deficiencies to be derived from a comparative evaluation of the relative strengths and weaknesses of competing offeror's proposals. Thus, deficiencies are the failure of a proposal to meet a solicitation requirement and weaknesses to failure of a proposal to compare favorably with another proposal.

Unless an offeror's proposal is removed from the competitive range based on information obtained during discussions, Meaningful discussions require that the offeror be given an opportunity to revise its initial proposal. It has been held that a discussions are not meaningful if the contracting activity did not give offerors, who had been informed during discussions that their cost proposals were not realistic, an opportunity to revise their proposals to respond to this criticism. Also meaningful discussions were not conducted where offerors who were not provided an opportunity to explain the discrepancy between the Government's estimate of hours necessary for performance of the contract and the numbers listed in the proposals.

Where a proposal contains no uncertainties or deficiencies, the opportunity to revise is all that is required for discussions to be meaningful. Thus, requests for BAFOs constitute meaningful discussions under these circumstances. The Comp Gen found that the minimum standard for discussions was met by a call for BAFOs, as the contracting officer considered all proposals in the competitive range highly acceptable and the request for meaningful discussions were not held where the government conducted no technical discussion and requested BAFOs limited to price revisions. The protest was sustained as the technical factor was assigned greater weight than price in the evaluation scheme and the deficiencies not in the protester's technical proposal were suitable for correction through discussions.

X. Final Proposal revision (FPR) or Best and Final Offer (BAFO):

1) Procedure for Requesting FPR's

After written or oral discussions have been conducted with all offerors within the competitive range, the contracting activity is required to invite FPR's. Oral requests for FPR's shall be confirmed in writing. The request shall include:

- Notice that discussions are concluded
- Notice that this is the opportunity to submit a best and final offer

- A common cutoff date and time that allows a reasonable opportunity for submission of written best and final offer.
- Notice that if a FPR is not submitted by the cutoff date, it will not be considered.

The purpose of establishing a common cutoff date is to prevent offerors from being treated unfairly or being prejudiced. The contracting officer may extend the closing date for receipt of FPR's if such extension will enhance competition. A late FPR may be considered for award only if it is received before award and the late receipt is due solely to mishandling by the government after receipt at the government installation.

After receipt of final proposal revisions, the contracting officer should not reopen discussions unless it is clearly in the Government's interest to do so, that is, it is clear that information available at that time is inadequate to reasonably justify contractor selection and award based on the best and final offers received. If discussions are reopened, the contracting officer shall issue an additional request for final proposal revisions to all offers still within the competitive range.

2) Procedure Following Receipt of FPR's

After receipt of FPR's the government must reevaluate the proposals as quickly as possible and to proceed to selection and award the contract. The reevaluation of each revised offer is to determine its current status in the competition. Evaluators have the same discretion in evaluation FPR's as they have in evaluating original proposals. There is no requirement for each FPR to be totally reassessed. It was found to be proper for the government to not bother reassessing because the changes in the FPR could not have altered the original determination that two proposals were technically equal. Once negotiations have been held and the FPR's have been received, discussions should not be reopened unless it is clearly in the best interest of the government to do so, since the conduct of another round of discussion in the absence of a valid reason tends to undermine the integrity of the competitive negotiation process.

3) Clarifications After FPR

It is difficult to draw the line between clarifications and discussions. Therefore, contracting officers are given considerable latitude in deciding to limit clarifications of FPR's in order to avoid the possibility of having conducted a discussion, which would necessitate another round of FPR's. The contracting officer, has the discretion to contact the offeror to obtain a clarification of the FPR and this would not require another round of FPR's. In some cases there is a single offeror that is far superior to the other competitors, but the agency is not entirely satisfied with its FPR. In such cases, the agency may conduct another round of discussions with only that offeror if evaluation of the FPR's indicates that only that offeror remains in the competitive range.

5) Multiple Rounds of FPR's

An FPR is final. Unless there are very unusual circumstances, contracting officers should not request multiple rounds of FPR's. Multiple FPR's are discouraged because of a belief that the use of multiple rounds of FPR's may motivate competitors to improperly attempt to obtain information about their competitors' proposals. Another risk in soliciting multiple BAFOs is that the contracting process will become an auction.

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